IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 112

C. L. WILLIAMS, Individually and as duly Appointed and authorized agent and representative for HERBERT AIKEN, et al.,

Petitioner,

— VS —

JACKSONVILLE TERMINAL COMPANY, a corporation,

Respondent.

BRIEF FOR PETITIONER, C. L. Williams, Etc.

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BRIEF FOR PETITIONER

STATEMENT OF FACTS

The parties in the brief will be referred to by their designation in the lower Court, that is, petitioner as plaintiffs and respondent as defendant.

Plaintiffs seek to reverse summary judgment entered by the Honorable Curtis L. Waller, Judge of the Jacksonville Division of the United States District Court, Southern District of Florida, on the 21st day of October, 1940, in an action under the Fair Labor Standards Act of 1938, 29 U. S. C. A. 201-216, (June 25, 1938), Chapter 676, Paragraph 1, 52 Stat. 1060, for unpaid wages and liquidated damages.

Plaintiffs and defendant each moved the District Court for summary judgment upon the pleadings, depositions and affidavits of each of the parties. Upon rendition of the summary judgment plaintiffs moved for a new trial, which was denied by the same Court on the 6th day of November, 1940.

Thereafter, plaintiffs below perfected their appeal from the District Court of the United States for the Southern District of Florida to the United States Circuit of Appeals, Fifth Circuit, and on March 4th, 1941, the said Circuit Court of Appeals affirmed the judgment of the lower District Court (R. 214), Judge Holmes dissenting (R. 221).

The complaint alleged that as the employer was engaged in Interstate Commerce and the work required of the plaintiffs was also Interstate Commerce, the defendant was required by said Act to pay plaintiffs the minimum wages as required by Section 6 (a) of said Act, of not less than twenty-five cents per hour from October 24th, 1938, to October 23rd, 1939, and thirty cents from the last mentioned date to June 30th, 1940, (R. 4).

July 1st, 1940, the plaintiffs were "put on the minimum rate of $2.40 for eight hours" (R. 64) (R. 87) and on August 1st, 1940, a definite final agreement made the minimum wage established by the "Hours and Wage Law" the rate of pay for plaintiffs (R. 134). The complaint alleged the neglect or refusal of the defendant to pay the minimum wage prescribed by the Act and asked for liquidated damages and attorneys fees as provided by the Fair Labor Standards Act.

The defendant answered denying that it had violated the Fair Labor Standards Act in refusing to pay the minimum wage, to which answer was attached a bill of particulars. The answer further alleged and admitted that the plaintiffs, (Red Caps), by a ruling of the Interstate Commerce Commission, dated September 28th, 1938, had been designated as employees under the Railway Labor Act, (R. 9).

The parties stipulated (R. 47):

> That both the petitioner and respondent were engaged in Interstate Commerce.
>
> That the plaintiffs were employees of the defendant from July 10th, 1937, to the date of filing the bill of complaint as defined by the Fair Labor Standards Act.
>
> That the bill of particulars attached to defendant's answer was a true statement of the number of hours worked by each of the plaintiffs, the amount received by each of the plaintiffs from the passengers, and the amount paid to each of the plaintiffs by the defendant by check drawn against the funds of the defendant.

Plaintiffs, had been employed by the Jacksonville Terminal Company as Red Caps, for many years under an agreement whereby they were required among other duties, "in handling of hand baggage and traveling effects of passengers or otherwise assisting them (passengers) at or about stations or destinations" (defendant's answer (R. 10, Par. 8)) to report at the Terminal at certain designated times, to meet certain trains, to take off certain passengers from the trains and to generally assist passengers using the Terminals in and about the trains, stations and taxicabs. The sole compensation was

the tips or gratuities received from the public.

The Red Caps were not permitted, under penalty of dismissal, to ask for tips or gratuities but were required to furnish the service gratis. The Terminal Company paid the Red Caps nothing.

July 10th, 1937, a proceeding was started in the Interstate Commerce Commission (R. 9) for the purpose of classifying the Red Caps as employees of the Terminal Company; September 29th, 1938, the Interstate Commerce Commission ruled the Red Caps were employees within the definition contained in the Railway Labor Act as amended.

Thereupon, L. L. Wooten, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, etc., on October 25th, 1938, wrote defendant, Jacksonville Terminal Company, (R. 94) to the effect that the Red Caps at the Jacksonville Terminal were covered "by the scope rule of our agreement all other rules covering group 3 are applicable" (R. 166) and requesting the advice as to the position of the Terminal Company.

October 24th, 1938,—the effective date of the Fair Labor Standards Act, the Terminal Company notified the Red Caps (defendant's answer (R-10, Par. 8 and R-121)) that they would be required to report daily the tips or remuneration received for the services ren-

dered passengers. The notice contained a guarantee of compensation, including the tips received, of not less than the minimum wage required by law. This arrangement being now designated by all parties as the *accounting* and *guarantee* plan.

Mr. J. L. Wilkes, President-General Manager of the defendant, Jacksonville Terminal Company, on October 27th, 1938, (R. 122) acknowledged receipt of Wooten's notice in a letter in which the Terminal Company, challenged Wooten's right to represent and denied the statement that the Red Caps were covered by the agreement of February, 1937, (R-166).

November 4th, a conference was held in Jacksonville, Florida, between Wooten, representing the plaintiff Red Caps, and Wilkes, representing the Terminal Company — from that date on, The Brotherhood's (represented by Wooten,) right to negotiate for the Red Caps (R-61 and R-62), and his contention that the Red Caps were covered or included in the agreement of February, 1937, (R-94 and 166) was not again denied, challenged or controverted by the Terminal Company.

Beginning with a letter of October 25th, 1938, through June 16th, 1939, Wooten in his representative capacity made twelve or more additional written requests for the entering into of a supplemental agreement to the col-

lective bargaining agreement of February, 1937, (R-94, 96, 97, 98 and 99). November 30th, 1938, (R-98) Wooten forwarded a proposed agreement (R-136) of the result of a previous conference, which proposed agreement (R-138) included a memorandum containing eight definite rules agreed upon (R-98 and 99) as the first amendment to the collective bargaining agreement claimed by Wooten, in his representative capacity to cover the Red Caps. This agreement in Paragraph 9 contained a specific rule requiring the minimum wage under the Fair Labor Standards Act to be paid the Red Caps. The Terminal Company refused to accept this agreement. However, during the month of June, 1939, a similar agreement was actually entered into by Wilkes on behalf of the Terminal Company and Wooten on behalf of the Red Caps (R-107), which was the first amendment to the collective bargaining agreement of February, 1937. August 9, 1940, (R-134) the agreement effective June 16th, 1939 (R-107) was amended, which agreement in paragraphs 1 and 2 thereof finally and definitely set a wage rule and was the second amendment of the collective bargaining agreement of February, 1937, which agreement Wooten definitely contended throughout the period of negotiations, from his letter of October 25th, 1938, to June 16th, 1939, was the collective bargaining agreement under which the Red

Caps were then working. With the exception of the letter of Wilkes, as representative of the defendant, Terminal Company, to Wooten of October 27th, 1938, (R-122) there is no challenge in the record that this agreement of February, 1937, (R-166) was not the collective bargaining agreement under which the Red Caps were working.

The tentative or proposed supplemental agreement tendered Wilkes on November 30th, 1938, (R-138) was taken paragraph by paragraph from this agreement of February, 1937, (R-166), which Wooten always contended covered the Red Caps. The agreement entered into the following June, 1939, (R-107) was, with the elimination of paragraph 9, practically the same agreement as the proposed agreement of November 30th, 1938, (R-138) and the original agreement of February, 1937, (R-166).

To the many requests of Wooten to the defendant, Terminal Company, for a definite settlement of the controversy raised by the letter of Wooten to the defendant, Terminal Company, dated October 25th, 1938, (R-93) and Wilkes' reply thereto of October 27th, 1938, (R-122) there are five letters from the Terminal Company, none of which challenge the contention of Wooten that the Red Caps were covered by the collective bargaining agreement of February, 1937, (R-166), but

each of which sought to postpone the final determination of the question of wages—which include the question of whether or not tips could or should be included in a wage to be paid by the Terminal Company under the Fair Labor Standards Act.

The plaintiffs refused to accept the conditions set forth in the notice of October 24th, 1938, (Plaintiff's answer, page 8, (R-10 and R-121)) through their duly authorized and recognized representative, Wooten, continued to negotiate or attempt to reach an agreement concerning not only the working conditions but primarily the rate of pay.

The agreement effective June 16th, 1939, (R-107) specifically excluded the question of wages and it was either mutually agreed between Wooten representing the Red Caps and Wilkes representing the Terminal Company that

> "we could negotiate all the rules except the wage rule and enter into an agreement to apply whatever was finally ruled on by the Wage and Hour Administrator with regard to the payment of wages (see plaintiffs, exhibit No. 11, (R-106 and 107)) and then withdraw the case from mediation, as I believe from our letters and conferences we are pretty well agreed on all the questions involved

except that of wages (Wooten's letter dated May 26th, 1939, (R-107))".

While the above mentioned negotiations were going on between the representatives of both parties the Red Caps were consistently reporting the amount of tips received from the passengers each day and likewise either retaining each and every the tips as they had theretofore done for the whole period of service or for the past 17 years or more.

Under the accounting and guarantee plan the Terminal Company neglected or failed, or refused to pay or make good the guarantee until required by a representative of the Wage and Hour Department who had checked its records to ascertain whether or not the Red Caps had received the money which the payrolls of the Terminal Company indicated had been paid them, R-66). The first money received by the Red Caps from defendant was subsequent to August 15th, 1939, at which time each of the Red Caps receiving any money, in signing a receipt therefor, retained and refused to forfeit or release any right to sue for any additional money that might be due under section 16 (b) of the Fair Labor Standards Act (R-165).

Even after the agreement (R-166) effective June 16th, 1939, was entered into, wages having been expressly excluded therefrom, it was mutually understood by Wooten, repre-

senting the Red Caps and Wilkes, representing the Terminal Company, that the question of tips as wages, was a matter for determination either by the Administrator of the Act or by some Court of competent jurisdiction. October 12th, 1939, the Administrator of the Fair Labor Standards Act, acting through one Gustave Peck, (R-164) after a hearing refused to rule on the validity of the accounting and guarantee arrangement as being a compliance with the Fair Labor Standards Act and specifically recommended the matter be determined by a Court of competent jurisdiction.

Between October 12th, 1939, and March, 1940, there was either pending or in process of being instituted several suits involving the accounting and guarantee plan (R-81 and 82). March 7th, 1940, a suit was instituted in the District Court of the United States for the Northern District of Texas, entitled "A. J. Pickett, etc., et al. vs. Union Terminal Company", which suit terminated in the District Court in favor of the Red Caps. Upon rendition of that judgment further conferences were had between Wooten, representing the Red Caps, and Wilkes, representing the Terminal Company, and upon refusal of the Terminal Company to compensate the Red Caps other than by the accounting and guarantee system, above outlined, this action was commenced.

In short (R-83 and 84):

"Q. Back of July 1, 1940, to the effective date of the act, was there any agreement or understanding between you and Mr. Wilkes that this accounting and guarantee system would be the amount that these men would receive under the Fair Labor Standards Act?

A. No, sir.

Q. In other words, the whole thing was under negotiation at all times, and no definite agreement was ever entered into as to the rate of pay of the men under this accounting and guarantee system until judicial determination of that wage question was made?

A. I have already stated that it was a dispute existing under the terms of the amended Railway Labor Act affecting the wages of these Red Caps.

Q. Then you never accepted this guarantee and the accounting system on behalf of the Red Caps at all?

A. No, sir."

OFFICIAL REPORTS OF OPINIONS IN COURTS BELOW

A summary judgment was entered by the United States District Court in and for the Southern District of Florida containing

written findings of fact and conclusions of law reported in the record at pages 195 through 203, the cases cited being reported in 35 Federal Supplement 267.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit will be found at pages 214 through 222 of the record and being reported in 118 Federal (2nd) 324.

JURISDICTION

The jurisdiction of this Court is invoked under Section 340 (a) of the Judicial Code as amended by the Act of February 13th, 1925, c. 229, Section 1, 43 Stat. 938, U. S. C. A. Title 28, Section 347 (a).

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit sought to be reviewed was entered on the 4th day of March 1941, (R-214).

QUESTIONS PRESENTED

1. Whether or not a Terminal Company subject to the Railway Labor Act and the Fair Labor Standards Act employing Red Caps also covered by the terms of said acts, will be permitted to violate section 156 of Railway Labor Act and assert any right or privilege under the unilateral action of serving notice upon said employee to report tips

and gratuities received from the passengers, for the purpose of using tips reported as payment in whole or in part of minimum wage required by the Fair Labor Standards Act after (1) more than 20 months of abandonment of the conditions attempted to be imposed by said notice, (2) recognition of a collective bargaining agreement between said Terminal Company and said Red Caps and (3) 20 months of negotiations relative to the modification of the collective bargaining agreement so recognized and the settlement of the identical matters, to-wit, wages and working conditions which were attempted to be changed by said notice.

2. Under the facts in the preceding question, has a Railroad Terminal Company, which prior to the effective date of the Fair Labor Standards Act employed Red Caps at its Terminal under a plan by which the Red Caps received no compensation from the employer other than the right to retain all tips and gratuities received from passengers, complied with Section 6 of the Fair Labor Standards Act by the serving of a notice upon the Red Caps that from the effective date of the Fair Labor Standards Act requiring the employees (Red Caps) to report all tips and gratuities so received and guarantees to said Red Caps the payment of the difference between the tips and gratuities so re-

ported and the minimum wage required by the Fair Labor Standards Act of 1938.

3. Whether or not the mandatory provision of Section 6, of the Fair Labor Standards Act, is satisfied by the application of tips or gratuities received by Red Caps from passengers as payment in whole or in part of the minimum mandatory wage required by said Act to be paid to the employees (Red Caps) by the employer (Terminal Company).

STATUTES INVOLVED

The statutes involved are Sections 3 (m), 6 (a) and 11 (c) of the Fair Labor Standards Act of 1938, c. 676; Sections 3 (m), 6 (a) and 11 (c), 52 Stat. 1060, U. S. C. A., Title 29; Sections 203 (m), 206 (a) and 211 (c), and Section 2 of the Railway Labor Act, as amended, c. 347; Section 2, 44 Stat. 577, as amended June 21, 1934, c. 691; Section 2, 48 Stat. 1186, U. S. C. A., Title 45, Section 152.

The provisions of the Fair Labor Standards Act of 1938 primarily involved are:

* * *

Section 3. As used in this chapter—

"(m). 'Wage' paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board,

lodging, or other facilities, are customarily furnished by such employer to his employees."

Section 6.

"(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

"(1) during the first year from the effective date of this section, not less than 25 cents an hour.

"(2) during the next six years from such date, not less than 30 cents an hour."

* * *

Section 11.

"(c) Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder."

Section 156 of the Railway Labor Act says:

"156. Procedure in changing rates of pay, rules, or working conditions.—Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act (Par. 155 of this title), by the Mediation Board, unless a period of ten days has elapsed after termination of conference without request for or proffer of the services of the Mediation Board. (May 20, 1926, c. 347, Par. 6, 44 Stat. 582; June 21, 1934, c. 69, Par 6, 48 Stat. 1197)." 45 U. S. C. Sect. 156.

SPECIFICATIONS OF ERRORS TO BE URGED

The Court below erred:

1. In holding that the Railroad may by its own fiat disregard its existing bargaining agreement with Red Caps and pending negotiations with their accredited representative, by its own unilateral action effect a change in the rates of pay and working conditions in the face of a continued series of protests and refusals to consent.

2. In holding that the Fair Labor Standards Act operated to give to the Railroad the property of its employees Red Caps in the nature of their tips; the gifts and gratuities to them from the general public.

3. In holding that the Railroad's notice to the Red Caps was sufficient in law to sustain the appropriation of the tips by the Terminal Company which had always been the property of the Red Caps by the contract of employment the property of the Railroad, despite the failure of the notice to assert ownership of the tips.

4. By holding that because the employer became liable to pay a wage, a tip from the public became a charge — which the railroad never imposed for Red Caps service — irrespective of the Railroad's right to so impose a charge — either before or after enactment of Fair Labor Standards Act.

5. By holding that a member of the general public, in giving a tip, had his donation converted into a payment of a charge irrespective of his intention and despite the fact that there was no charge — because of the Railroad's absolute obligation to pay its employees a stated wage.

6. In holding that because the Fair Labor Standards Act made the Railroads owe the employees wages, that said Act operated to require the tipping public to pay these wages.

7. In holding that tips were not personal gifts of the passengers to the Red Cap employees but charges paid the agent of the employer despite conceded gratuitous character of tips over a 17 year period by employer and employee and despite the employer's standing instructions that an employee must not demand a charge or tip for service which instruction remained unchanged by the notice.

8. By holding that the Railroad could assert that its notice imposed a condition of employment, despite the Railroad's clear abandonment and waiver thereof; and despite the Railroad's execution of a collective bargaining agreement silent on wages and rates of pay for the admitted purpose of awaiting an authoritative determination of the Red Caps' right to and ownership of tips.

SUMMARY OF ARGUMENT

FIRST PROPOSITION: Whether or not the notice of the defendant to the plaintiffs, posted October 24th, 1938, (R-10, 121, 155) had any validity whatsoever in law or in fact after complete abandonment by both parties and the very matter, to-wit, wages of the Red Caps being negotiated and finally settled some eighteen months subsequent to the delivery and posting of said notice.

SECOND PROPOSITION: Whether or not tips or gratuities received by the Red Caps from passengers under a contract with the employer that such tips and gratuities so received constituted their compensation could by a unilateral action be appropriated by the defendant, Terminal Company, against the consent of the employees and used by the defendant, Terminal Company, as a part payment of the minimum mandatory wage required by the Fair Labor Standards Act to be paid by the employer (Terminal Company) to the employees (Red Caps).

ARGUMENT

Whether or Not the Notice of the Defendant to the Plaintiff Posted October 24th, 1938, (R. 10, 121, 155) Had Any Validity Whatsoever in Law or in Fact After Complete Abandonment by Both Parties and the Very Matter, To-Wit, Wages of the Red Caps Being Negotiated and Finally Settled Some Eighteen Months Subsequent to the Delivery and Posting of Said Notice.

This proposition will be, in this brief, treated under two questions:

First: The effect of the notice to the Plaintiff under section 156 of the Railway Labor Act.

Second: The consideration given the notice by the Terminal Company and the Red Caps.

First: The Effect of the Notice to the Plaintiffs Under Section 156 of the Railway Act.

Approximately one month before the effective date of the Fair Labor Standards Act, the Interstate Commerce Commission by its ruling determined the status of the Red Caps as *employees* covered by the Railway Labor Act. All other status, titles, designations, or ideas, such as licensees of the Terminal Company, or even trespassers — ceased. They were employees.

By continuing to allow the Red Caps to receive tips and gratuities from the passengers as their compensation, the Terminal Company ratified or confirmed the contractual relations regarding the right to and ownership of tips as being the property of the Red Caps, or in other words, their wages for the work performed for the company. It was at this time September 28th, 1938, that the Terminal Company may have made a new agreement — not after effective date of the Fair Labor Standards Act — for the agreement of February, 1937, was then effective and no change could be made without violation of Section 156 of the Railway Labor Act.

October 25th, 1938, Wooten, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees advised the Terminal Company, the Brotherhood had jurisdiction over the Red Caps and that their agreement of February, 1937, covered the Red Caps. October 27th, 1938, the Terminal Company challenged both this jurisdiction and this coverage claimed by Wooten.

But the right of the Brotherhood to represent under, and the coverage of the Red Caps by, the then existing collective bargaining agreement of February, 1937, (R-166), was at the conference of November 4th, 1938, between two representatives of the parties,

forever settled.

> "A. Mr. Wooten has done all the bargaining and consulting with me in regard to the Red Caps, although I have not at all times agreed with his conclusions. Mr. Wooten has come to see me in regard to the Red Caps." (R-61).

The only authority Wooten had to treat with Wilkes for the Red Caps was the collective bargaining agreement of February, 1937. Wilkes could not receive him as agent of the Red Caps with his fingers crossed as to the authority to represent.

The Terminal Company's recognition of Wooten and its subsequent failure to challenge the coverage of the Red Caps by the agreement of February 17th, 1937, until after the institution of this suit leaves the inescapable conclusion that each of the parties considered that this agreement covered these Red Caps from the date of the ruling of the Interstate Commerce Commission.

On November 30th, 1938, Mr. Wooten submitted an amendment to this February, 1937, agreement, which was not acceptable to the defendant, (R. 138-147). Negotiations continued and June 16th, 1939, (R. 107 to 116) an agreement was entered into which is substantially the same as the agreement submitted on November 30th, 1938, (R. 138) but

by agreement, silent as to wages. In both of these amendments paragraph after paragraph was taken from the February 1st, 1937, (R. 166) agreement, such paragraphs incorporated without change in the final agreement effective June 16th, 1939. This agreement was subsequently amended as to rates of pay subsequent to August 1st, 1940, (R. 133 and 134).

The collective bargaining agreement of February 1st, 1937, and the subsequent amendments thereto, is the collective bargaining agreement which Section 156 of the Railway Labor Act prevented the Terminal Company from altering and held status quo the right of the Red Caps to the tips and gratuities received from the passengers.

The simple words of the layman, Wooten to Wilkes (R. 97) in the letter of November 26th, 1938;

> "We have advised you that we will expect the terms of our existing agreement to apply to the Red Caps until such time as changes might be made."

was never by any subsequent word or action, contradicted or challenged but was by the subsequent negotiations ratified and confirmed.

The Terminal Company had no right under the Railway Labor Act, to appropriate for its

use the tips reported by the employees and thereby attempting to change the existing agreement as to wages without a direct violation of Section 156 of the Railway Labor Act. To condone such a proposition the whole effect of the Railway Labor Act will be stultified and emasculated. Can the defendant say—yes, we negotiate—and afterwards say, but we cannot by such negotiations be bound because by unilateral action, we posted a notice which we now assert imposed a condition which you could take or leave — notwithstanding your existing bargaining agreement; notwithstanding its recognition by us; notwithstanding our continued negotiations with you; notwithstanding our duty to deal with one entity in one way alone—your bargaining agent—we will insist that we deal with you individually—impose a condition of contract and thus we avoid the effect of both the Railway Labor Act and the mandatory provision of the Fair Labor Standards Act.

Second: The Consideration of the Notice by the Terminal Company and the Red Caps.

The Red Caps did not accept the terms of the notice as appropriation by the Terminal Company of the tips or gratuities to pay in part or in whole, the wage that they were entitled to under the Fair Labor Standards Act.

To the contrary the next day after the effective date of the Act, which was also the date of the notice, Mr. Wooten, representing the Red Caps, asked for the first conference concerning the very matters contained in the notice.

From this date to within two or three weeks prior to the filing of this suit, there was a continued attempt, request and demand by Wooten upon Wilkes, and conferences and negotiations between Wooten for the Red Caps and Wilkes for the Terminal Company, to consider the question of wages, and the relation of tips to wages, Wooten contending at all times that tips were property of the Red Caps.

The Terminal Company in the notice did not assert ownership of the tips but specifically continued to the Red Caps, the privilege to retain their tips. (Its representative, Mr. Wilkes, never contending that tips were wages, his whole attitude being that the plan was one of substitution until some judicial determination was rendered adjudicating the validity of the plan).

His whole action, attitude towards, and consideration of this question was one of delay.

> "My people wish to see what ruling will be on tips before we can agree to wage rates." (R-128).

This quoted matter appears in the letter, Plaintiffs' Exhibit 24, from Wilkes to Wooten, dated March 4, 1939, and again,

> "This question * * has been carefully considered by this company and its owning carriers. Several suits * * * seem to have the same main question of issue as is involved here, i. e. whether tips can be considered wages." (R-136).

This quotation being in Plaintiffs' Exhibit 31, letter from Wilkes to Wooten, dated August 14, 1940.

October 25th, 1938, Wooten advised the Terminal Company that the bargaining agreement of February, 1937, covered the men and requested a conference (R-10). Negotiations and conferences continued and it was recognized by both sides that there was an existing dispute as to wages and hours. By these negotiations the Terminal Company clearly abandoned and waived any effect sought to be given the notice and never claimed or pretended to claim ownership of the tips.

The Terminal Company did not further consider the notice and plan suggested as in operation, for it neglected or refused to pay any amounts guaranteed by the notice until the latter part of July or the middle of August, 1939, (R-67-68) and after payment of a settlement the Terminal Company ac-

cepted the receipt of the Red Caps originating in the Wage and Hour Department at Washington (R-66), in which receipt (R-165) the following matter was incorporated:

> "it is my understanding that by signing this receipt I do not forfeit or release my right to sue for such additional amount as may be due under Section 16 (b) of the Act." (R.-165).

The Terminal Company paid no tax on the tips reported; but paid only on the amounts they actually paid the Red Caps. (R-70).

This abandonment in fact and the waiver of any rights under the notice by the Terminal Company by its subsequent conduct, and retention by Red Caps of their right to assert a claim for back wages under the Fair Labor Standards Act, clearly indicated that neither the Red Caps nor the Terminal Company considered the notice as having any legal or factual validity.

Not until the first hearing on the motions for summary judgment in the District Court was this ownership of the tips by the Terminal Company first asserted and then only as a construction of counsel. That construction is not supported by the record.

The refusal of the Red Caps to accept the notice; the abandonment of the notice by the Terminal Company; the subsequent joint ne-

gotiations and conferences by the parties regarding the very matter; tips in relation to wage contained in the notice can permit but one construction, i. e. no final determination; no effect whatever; a nullity.

And the blunt fact remains that the employer has not paid the minimum wage that the Fair Labor Standards Act requires every employer shall pay.

Whether or Not the Mandatory Provision of Section 6, of the Fair Labor Standards Act, is Satisfied by the Application of Tips or Gratuities Received by Red Caps from Passengers as Payment in Whole or in Part of the Minimum Mandatory Wage Required by Said Act to be Paid to the Employer (Terminal Company).

Section 206 of the Fair Labor Standards Act, 1938, says:

> "(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates."

We are dealing here only with Fair Labor Standards Act and not any other Act, statute or ruling of any commission. It is the mandatory requirement of the act "that the employer shall pay." The act contains no word, or words, or phrases suggesting any guaran-

tee of payment. So that no substitute could be used to avoid the effect of this mandatory provision, Congress saw fit to make one exception, that is, to allow board, lodging, and other facilities to be considered as part of the wages to be paid.

To prevent abuse of this exception, the manner of ascertaining the money value of such board and lodging and other facilities to be determined solely by the Administrator of the act.

This we submit, is the only manner in which the Terminal Company or any other employer could substitute anything of value as part of the wage mandatorily required to be paid.

> "I think that if Congress had intended that tips be included in the meaning of the word wages, it would have said so." Dissenting opinion of Judge Holmes. (R.-121).

The adjudicated cases definitely hold that;

> Wages are the reward paid for labor; a compensation given to a hired person for his or her services.

In Re: Gurewitz (2 Cir.) 121 F. 982;

> "Both salary and wages are terms invariably used in defining the consideration which an *employer bestows* upon one who is serving him in consideration of his

services, and is never applied in describing the gain, profit or recompense which accrued to one who is conducting a business of his own and upon his own account."

See also:

Roberts vs. Frank Carruthers & Bros. (Ky.) 1918, 202 S. W. 659, 661.

Gay vs. Hudson, 178 F. 499, 503, citing Moore vs. Heaney, 14 Md. 558.

67 C. J. 284.

Colver vs. Foster Screen Co., 99 N. J. Eq. 734.

La Juett vs. Coty Machine Company, 272 N. Y. S. 822.

First Nat. Bank of Wilkes-Barre vs. Barnum, 160 F. 245.

These definitions indicate that wages are paid by the employer—not by any third person—outside the contract of employment. The word tips or gratuities does not appear.

TIPS

Judge Sibley in the opinion passes the question by the simple assertion,

"We are not concerned with the proper meaning of the (tip) word, but with the

> legal status of what the passengers paid their Red Caps by whatever name called". (R-217).

To be not concerned with the meaning of the word tip in relation to the mandatory provision of the Fair Labor Standards Act to pay wages, is to ascribe to Congress the remarkable conclusion,

> "That a Congressman in 1938 was not familiar with the tipping practice." Pickett vs. Union Terminal, 33 F. Supp. 244.

Petitioners contend the general rule of construction to be;

> "That words should be given their usual and ordinary meanings, unless the contrary clearly appears from the circumstance in which they are used." (R-221) Dissenting opinion of Judge Holmes.

The opinion of the Circuit Court of Appeals (R-214) is contra to the adjudicated cases which hold that the burden is on the employer to show a clear agreement by his employee to turn the tips over to him.

In Polites vs. Barlin (Ky. 1912) 147 S. W. 829, it was held tips "were a personal gift to (employee) and he and not appellant was entitled to receive them." This is likewise held in Zappas v. Roumeliote, 156 Iowa, 709,

137 N. W. 935 and McRae vs. McBeath, 5 N. B. 446;

In Gay vs. Paige (1907), 150 Mich. 463, 114 N. W. 217, a superintendent was entitled to "a mere gratuity for his services, after they had been rendered without any expectation or understanding as to reward."

In Aetna Insurance Company vs. Church (1871), 21 Ohio St. 492, it was held, an insurance company could not recover from its agent mere gratuities paid to him by other companies which, instead of adjusting loss by fire for themselves, accepted adjustments made by the agent for his own company.

The several cases in which ownership of tips, have been adjudicated, hold no more than that;

> a tip is a matter of contractual relation between the parties and belongs to the donee unless the contrary appears.

By the stipulation of the parties (R-47), it is agreed that the Red Caps were employees of the Terminal Company as defined by the Fair Labor Standards Act, as of July 10, 1937, which is more than a year prior to the effective date of the Fair Labor Standards Act.

The contract with the Red Caps was, that the Red Caps were to receive the tips and gratuities from the passengers as their prop-

erty. To change this contract and enter into a new contract required the operation of one of the fundamental principles of the law of contracts, that is, the meeting of the minds of the parties contracting.

This record shows that July 10th, 1937, (R-47) including the 24th day of October, 1938, the effective date of the Fair Labor Standards Act, until the bringing of the suit in the District Court below, the Red Caps never consented to accept any change in this contractual relation. There was never any attempt by the Terminal Company to assert that the notice contained any such change until after the institution of this suit.

Prior to the effective date of the Fair Labor Standards Act and the posting of the notice (R-10) by the Terminal Company, the Terminal Company never contended that it had any right in or to the ownership of the *tips*. The guarantee and accounting was devised by the Terminal Company not to comply with the terms of the Act but to evade as well as avoid the payment of the minimum wage.

Despite the provisions of the Fair Labor Standards Act, the stipulation of the parties (R-47), and the provisions of the Railway Labor Act and the finding of the Interstate Commerce Commission, ex parte number 72, (defendant's answer, Par. 6, (R-9)), the District Court held the Red Caps "were working

for themselves and the passengers whom they served and whose orders they obeyed" and that the Fair Labor Standards Act was satisfied in that the Terminal Company "furnished him the opportunity and the facilities wherein and wherewith to apply his trade" (R-201).

The Circuit Court of Appeals disregarded this view and held to the effect that the Fair Labor Standards Act, itself, operated to take away from the Red Caps their property (tips) and give to the Terminal Company all the tips paid the Red Caps after the effective date of the Fair Labor Standards Act for by operation of law the tips then became the property of the Terminal Company, which they had a right to include as wages to satisfy the Fair Labor Standards Act.

We respectfully submit that Judge Holmes in his dissenting opinion has placed the proper construction upon the Act, that is:

> "The general rule is that words should be given their usual and ordinary meanings, unless the contrary clearly appears from the circumstances in which they are used." (R-221).

and had Congress wanted to include anything else under the head of wages which might be construed into an inclusion of tips received by an employee as a deduction from the legal wage provided for, it might have easily in-

cluded such additional words as "other remuneration" or "income from other sources" instead of the particular language used in Section 6 of the Fair Labor Standards Act, to-wit:

> *"Every employer shall pay to each of his employees* who is engaged in commerce or in the production of goods for commerce *wages* at the following rates."

CONCLUSION

Petitioners respectfully submit in conclusion that:

(1) the tips were the property of the Red Caps by the express or implied contract of employment;

(2) no change of the contract of employment in regard to the payment of wage could be forced upon the Red Caps by the unilateral action of the Terminal Company and against their consent.

(3) the Fair Labor Standards Act did not ipso facto cancel the contract of employment of the Red Caps with the Terminal Company and convert the property of the Red Caps (tips) into wages paid by the employer as required by the Act;

(4) after the final amendment of the collective bargaining agreement was entered in-

to after 21 months of negotiations wherein the wages of the Red Caps were finally agreed upon—the Terminal Company should not be allowed to assert any rights or claims under the notice served October 24th, 1938, and in this manner violate the mandatory provisions in the Railway Labor Act and the Fair Labor Standards Act.

Wherefore, for the errors shown plaintiffs urge that the judgment of the Circuit Court of Appeals may be reversed and this cause remanded to the United States District Court for the Southern District of Florida for the entry of an order granting plaintiffs' motion for a summary judgment and the relief sought by plaintiffs against defendant, or so much thereof as this Court may consider proper in view of the facts and law as presented.

Respectfully submitted,

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